

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 05-44481-rdd

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In the Matter of:

DELPHI CORPORATION, ET AL.,

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

April 23, 2009

10:33 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

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HEARING re Motion for Orders Approving Bidding Procedures;  
Approving Form and Manner of Sale Notices; and Setting Sale  
Hearing Date on the Sale of Debtors' Assets Comprising Debtors'  
Brakes and Ride Dynamics Business

HEARING re Motion to Compel the Payment of Administrative  
Expense Claim Pursuant to 11 U.S.C. Section 503(b)(1)(A)

HEARING re Motion to Disband Committee or suspend Equity  
Committee

HEARING re Proposed Forty-Second Omnibus Hearing Agenda

HEARING re Debtors' Reply in Support of Expedited Motion to  
Disband or Suspend Equity Committee

HEARING re Debtors' Reply in Support of Brakes and Ride  
Dynamics Business Sale Motion

HEARING re Notice of Hearing

Transcribed by: Sharona Shapiro

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A P P E A R A N C E S : (continued)

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1 A P P E A R A N C E S : (continued)

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P R O C E E D I N G S

THE COURT: Delphi Corporation.

MR. BUTLER: Your Honor, Jack Butler, Kayalyn Marafioti and Ron Meisler here today on behalf of Delphi Corporation for its forty-second omnibus hearing. We've filed, as is customary, an agenda in the case for this hearing on the docket at docket number 16570 and would ask to proceed in that order.

THE COURT: Okay. That's fine.

MR. BUTLER: Your Honor, we have a number of motions that were scheduled today that have been adjourned to later dates.

Matters 1 and 2, the steering option exercise motion at docket number 16410 and the GM arrangement fourth and fifth amendment approval motion at docket number 16411, have already been adjourned at a chambers conference earlier this week to May 7, 2009.

And we have two creditor motions that have also been adjourned. The first of these is the motion of CXX Transport, Inc. to compel the payment of an administrative expense claim at docket number 16548. This deals with about 97 freight invoices, about 260,000 dollars in dispute. This is a pure trade claims reconciliation in the case, Your Honor. It's the debtors' view, and we believe the facts are, that we've paid all the invoices that have been submitted to us with proper

1 documentation, including proofs of delivery. And there has  
2 been an agreement to adjourn this further to the May 21st  
3 omnibus hearing so that the movant can review their records and  
4 provide for the documentation of the debtors.

5 THE COURT: Okay. I'm not sure the claim procedures  
6 order applies to a post-petition claim, but I certainly would  
7 recommend that the parties, since this appears to be just a  
8 dispute over what's owing, that the parties try to follow those  
9 procedures even though they don't necessarily --

10 MR. BUTLER: We've been essentially trying to do that  
11 by trying to reconcile their claim.

12 THE COURT: All right.

13 MR. BUTLER: And that's what we're working for, Your  
14 Honor.

15 THE COURT: Okay.

16 MR. BUTLER: I'll take that back as well. Thank you.

17 THE COURT: Okay.

18 MR. BUTLER: And then matter number 4 on the agenda  
19 is Lasore's (ph.) motion to compel the debtors' performance  
20 under a nonresidential real property lease. This involves a  
21 vacated premises or warehouse in Columbia, Tennessee that was  
22 vacated back in October of 2008. Counsel asked us to further  
23 adjourn this matter to a May 21st hearing. We've agreed to do  
24 that. They understand that we're going to file, at the  
25 appropriate juncture in this case, in connection with a plan

1 modification hearing, papers that will reject this lease  
2 retroactive to that date. They've been on notice of that since  
3 last year.

4 THE COURT: Okay.

5 MR. BUTLER: And they've asked us to put this off.  
6 We've agreed to do it.

7 THE COURT: Okay.

8 MR. BUTLER: Your Honor, the next matter on the  
9 agenda is matter number 5. This is the second accommodation  
10 amendment motion at docket number 16534. Your Honor approved  
11 this on an interim basis on April 3 , 2009 at docket number  
12 16549.

13 Your Honor, we also have, based on developments  
14 between the interim hearing and the final hearing, we've  
15 negotiated, as we were advised by the court order this week, we  
16 have negotiated further supplemental changes to this amendment  
17 and we filed a notice of these supplemental amendments at  
18 docket number 16573. As supplemented, this is the second  
19 amendment to the accommodation agreement between the debtors  
20 and the DIP lenders. The original accommodation agreement was  
21 approved back on December 3rd on docket number 14515, and the  
22 first amendment, as supplemented -- the supplemental amendment  
23 was approved by Your Honor on February 25, 2009 at docket  
24 number 16377.

25 Your Honor, the genesis, frankly, of these amendments



1 dates back to the fact that last month the auto task force in  
2 the United States Treasury blocked, at least on an interim  
3 basis, approval of the fourth and fifth amendments to the GM  
4 arrangement and the global steering business option exercise  
5 agreement. Those matters remain under negotiation with the  
6 auto task force, General Motors, and our DIP lenders, and we  
7 are continuing discussions, as Your Honor is aware, with those  
8 parties and other stakeholders, including our creditors'  
9 committee, regarding developing a term sheet for an appropriate  
10 resolution of these cases.

11 The changes that were made to the amendment that is  
12 before the Court now for final hearing adjusts the deadlines  
13 and milestones for those discussions as they are continuing.  
14 Specifically, the second supplemental amendment provides for an  
15 extension to May 4, 2009, back from April 17, of the deadline  
16 to deliver the DIP lenders a term sheet with GM and the  
17 Treasury Department with respect to the resolution of these  
18 cases. The first opportunity for an obligation for the debtors  
19 to be triggered with respect to the incremental borrowing base  
20 cash collateral would be May 5, 2009. There's a similar grace  
21 period, as there have been in the past, and there is an outside  
22 date for the accommodation period of May 9, 2009, in the event  
23 that the requisite percentages of participant lenders have not  
24 affirmatively notified Delphi that the term sheet delivered to  
25 them was satisfactory. So we've essentially taken the April

1 dates and moved them into May as we continue these discussions.

2           There are a couple of other elements of changes that  
3 have been noticed out. These include the fact that if Your  
4 Honor approves this matter today, the future tranche, the  
5 interest payments would be applied and we'd pay the tranche A  
6 and tranche B DIP loans till those loans are repaid in full.  
7 The credit agreement would be amended to add the PBGC as a  
8 party to which the agents are required to provide copies of the  
9 notices prior to taking enforcement action against the  
10 collateral. Certain adjustments would be made to the  
11 definition of minimum borrowing base cash collateral account  
12 balances, and there would be a payment of an additional twenty  
13 basis point fee in connection with this. There would be a  
14 further paydown on the tranche A and B of twenty-five million  
15 dollars, and there would also be the payment of some related  
16 additional fees and expenses.

17           Your Honor, that's the substance of, I think, the  
18 material changes that were made that have been noticed out in  
19 connection with this. There have been no objections filed by  
20 any stakeholder, either at the interim or final hearings, save  
21 the statements that were filed at the initial hearing by the  
22 auto task force which were resolved at that hearing. And, Your  
23 Honor, the order here asks Your Honor to waive, to the extent  
24 applicable, the ten-day stay that may be imposed by Bankruptcy  
25 Rule 6004(h), as of today's date, because we need to take this

1 order on a final basis consistent with the DIP agreement and  
2 implement the transactions proposed by it.

3 THE COURT: Okay. Let me just make sure -- I  
4 received a blackline and clean copy of the second supplemental  
5 second amendment as well as the proposed final order. Have  
6 there been any changes since that?

7 MR. BUTLER: No, Your Honor, there's not been.

8 THE COURT: And I also received the expense letters  
9 that involve two different arrangement fees dealing with the  
10 administrative agent and the accommodation agent. Those are  
11 the only two --

12 MR. BUTLER: Yes, Your Honor.

13 THE COURT: -- fees in addition to the --

14 MR. BUTLER: That is correct.

15 THE COURT: -- to the twenty basis points fees that  
16 are alluded to in the amendment?

17 MR. BUTLER: Correct, Your Honor.

18 THE COURT: Okay. All right. Does anyone have  
19 anything to say on this motion? Okay.

20 This was the subject of a chambers conference earlier  
21 this week. I've reviewed the changes and I find them to be  
22 reasonable, and I will approve them. It clearly makes sense to  
23 continue the discussions that now involve the auto task force,  
24 given their relationship to GM and the integral nature of GM's  
25 role in the interim and final exit process for these debtors.

1 So this is a valid exercise of the debtors' business judgment.

2 MR. BUTLER: Thank you, Your Honor. Your Honor, the  
3 next matter on the agenda is matter number 6. It's the brakes  
4 and ride dynamics businesses sale motion at docket number  
5 16533. There was a response filed, which I'll address in a few  
6 minutes, by the Pension Benefit Guaranty Corporation at docket  
7 number 16563.

8 Your Honor, this is a transaction in which the  
9 debtors propose to sell two businesses: their brakes businesses  
10 and their ride dynamics businesses, which were both categorized  
11 as noncore assets back in the debtors' 2006 transformation  
12 plan. The proposed purchaser is Beijing West Industries Co.,  
13 Ltd. The selling entities are a combination of debtor and  
14 nondebtor entities. The debtor entities are Delphi  
15 Corporation, Delphi Automotive Systems, LLC, and Delphi  
16 Technologies, Inc. There are a number of nondebtor affiliates  
17 who are also selling this. The purchase price is ninety  
18 million dollars, subject to certain adjustments. Approximately  
19 thirty million of that is allocated to the selling debtor  
20 entities, and the balance of the purchase price and the  
21 majority of the assets are being sold outside of the debtor  
22 entities.

23 Today's hearing is really focused on approval of the  
24 bidding procedures, including the proposed breakup fee, which  
25 is three percent of the sum of the preliminary purchase price,

1 approximately 2.94 million dollars. There is, in these  
2 procedures, a proposed auction process and notice process  
3 similar to the marketing we've done in the past with the other  
4 assets. As our papers indicate, these assets have been  
5 extensively marketed over the last several years, but we would  
6 give further notice again and provide a bid deadline of May  
7 11th, an auction at May 15th, and we would come back here at  
8 the May omnibus hearing on May 21st for a final sale hearing.

9 Your Honor, just briefly, the brakes business  
10 produces brake systems and components ranging from traditional  
11 hydraulic brake systems to controlled brake products and other  
12 technology. The brake system also offers brake corner modules  
13 and a series of other assembled components. The brakes  
14 business has assets in China, the U.S., and Mexico, with two  
15 manufacturing facilities located outside of the United States,  
16 and engineering capabilities both here in the United States and  
17 outside of the United States.

18 The ride dynamics business has two product lines, a  
19 passive dampers line and an electrically controlled damping  
20 systems line. And it has significant manufacturing assets  
21 located in China, India, Mexico, Poland, and the United  
22 Kingdom, as well as engineering both within and outside of the  
23 debtor entities in the United States.

24 Just to give some indication of employee size, there  
25 are 843 employees that work for the brakes businesses. Of

1 those, 149 are U.S. employees. Primarily all of those are  
2 salaried engineers. With respect to the rides dynamic  
3 business, there are about 2,000 -- a little over 2,100  
4 employees. And of those, 124 are U.S. employees, again,  
5 primarily salaried engineers.

6 As I indicated, these assets have been extensively  
7 marketed since late 2007 and early 2008. There have been  
8 almost 200 potential buyers that have been solicited for this.  
9 There were more than fifty confidential information memoranda  
10 that were solicited. And there was a process that led to the  
11 transaction that is before the Court today.

12 Your Honor, I think the process we're using here is  
13 very similar to those that Your Honor has approved before. If  
14 there is a wrinkle in this particular bidding procedures  
15 hearing -- we're asking for approval of the bid protection for  
16 the bidding procedures -- it's that the PBGC filed the response  
17 that it did at docket number 16563. And the position that PBGC  
18 has taken is not one that we disagree with in terms of the  
19 basic assertion, which is that it simply wanted to make sure  
20 Your Honor's not trying to sell these assets free and clear of  
21 liens that may otherwise be enforceable in nondebtor entities.  
22 We're not asking the Court to do that. Our papers are clear in  
23 that respect. It's not a bidding procedures objection in the  
24 first instance, and anyway it would be a sale objection. But  
25 the objection, as it is filed, we think has no merit either at

1 the sale hearing or at this hearing. And I'm not going to  
2 really address it beyond that and beyond what's in our  
3 response, Your Honor, that we filed yesterday.

4 What it has done, though, is raised a question that  
5 we wanted to provide some clarity to the Court on, which is  
6 we're asking Your Honor to approve an almost three million  
7 dollar breakup fee here, and we wanted to have clarity on this  
8 record that the existence of these alleged liens, which the  
9 debtors dispute as to their enforceability, would not, in and  
10 of themselves, give rise to the purchaser being able to assert  
11 a termination event and then collect a breakup fee because of  
12 the existence of those.

13 And I would also tell the Court that the debtors are  
14 committed, prior to the completion of the sale hearing, to  
15 resolve these issues as to the sale on a final basis, either  
16 through a resolution with the PBGC so that they would  
17 acknowledge the sale would go forward without the assertion of  
18 those liens, or an acknowledgment from the buyer that they're  
19 prepared to close with the risk of those alleged liens out  
20 there, and therefore, these would be viewed as permitted  
21 encumbrances.

22 THE COURT: All right. Well, in light of the  
23 objection, I reviewed the proposed order, and perhaps with a  
24 little less care, the agreement. And I didn't see any  
25 obligation on the debtors' behalf to deliver the nondebtor

1 assets free and clear of liens.

2 MR. BUTLER: There is no such obligation, but what  
3 there is, is this standard sort of out of bankruptcy court set  
4 of obligations in the contract of what's a permitted  
5 encumbrance and what's not a permitted encumbrance in that  
6 place. And what I wanted, Your Honor, is we're going to make  
7 sure that we have clarity on that between the debtors and --

8 THE COURT: But it's clear that the right to the  
9 breakup fee is not tied to a termination based on the existence  
10 of these liens -- these asserted liens.

11 MR. BUTLER: Based on the alleged existence of the  
12 liens.

13 THE COURT: Right.

14 MR. BUTLER: Mr. Abramowitz is here on behalf of the  
15 purchaser. We've worked out probably six short paragraphs --  
16 and they are relatively short, they're mostly sentences -- that  
17 we're going to add to the order on this to make sure that we've  
18 clarified it and there's comfort. But they have agreed that  
19 the mere existence of these purported liens, as filed in the  
20 D.C.'s reporter's office, without a successful action to  
21 enforce the purported liens, are not encumbrances for purposes  
22 of their right to a breakup fee.

23 THE COURT: Okay.

24 MR. BUTLER: And they've agreed that the purported  
25 liens would need to be enforceable in the local and applicable



1 jurisdictions in order for those liens to be encumbrances.  
2 There's a series of -- those are definitional things -- there's  
3 a series of agreements. We've agreed, among other things, to  
4 extend indemnities, to clarify what their termination rights  
5 would be without the breakup fee, and to take some other  
6 actions. We'll put this in the order and submit it to Your  
7 Honor.

8 THE COURT: Okay.

9 MR. BUTLER: I'm not going to read all of the actual  
10 language into the record, but we wanted the Court to understand  
11 that the mere existence of these alleged liens in these foreign  
12 jurisdictions would not give you the right to approve this  
13 order today and for tomorrow the purchaser to say okay, pay me  
14 2.9 million dollars.

15 I'd also point out that there is, for any alleged  
16 breach of the agreement by the sellers, there is a thirty-day  
17 notice and a thirty-day cure period. So we'd have, on this and  
18 any other breach, to the extent that the liens were deemed to  
19 be enforceable, there still would be a notice process they'd  
20 have to go through with us and an opportunity for us to resolve  
21 this on a commercial basis with them, and if need be, at that  
22 point in time, with the PBGC. But having said that, Your  
23 Honor, it is our intention, prior to the completion of the sale  
24 hearing, to resolve these nondebtor issues on a commercial  
25 basis.

1 THE COURT: Okay.

2 MR. BUTLER: The other thing I guess I want to  
3 mention, Your Honor, is we did submit a declaration from Mr.  
4 Stip (ph.), the company's director of restructuring here at  
5 Delphi. And I would ask Your Honor that that be admitted into  
6 evidence supporting his application.

7 THE COURT: Okay. Does anyone have any objection to  
8 that? All right, I reviewed it, and it will be admitted.

9 MR. ABRAMOWITZ: Good morning, Your Honor. Steven  
10 Abramowitz on behalf of the buyer, Beijing West Industries. I  
11 concur, in concept, with what Mr. Butler described. We do have  
12 a complicated series of e-mails that clarify the basic  
13 agreement that'll be put into the order. But the basic  
14 agreement is that we agree that because of the current state of  
15 the purported liens being asserted by the PBGC, which the buyer  
16 believes are not enforceable liens, because of that we would  
17 not be entitled to the breakup fee. So for purposes of the  
18 breakup fee, we're making that change. In exchange, there are  
19 other clarifications, including an extension of the indemnity  
20 with respect to liens. And that's going to be worked out in a  
21 final order to be delivered --

22 THE COURT: All right, but I'm not approving that  
23 today -- the second point today, or am I?

24 MR. BUTLER: No, the only thing, Your Honor, that is  
25 in here, there are some clarifications to the document. The

1 agreement itself is subject to the final hearing. The only  
2 thing that's being approved today are the bid procedures.

3 THE COURT: Okay, fine. All right, anything else on  
4 this motion?

5 MR. MENKE: Your Honor, John Menke with the PBGC. I  
6 just wanted to state for the record that based on the reply  
7 that we received from the debtors and discussions with them and  
8 what Your Honor said here this morning, we appreciate the  
9 clarification that the free and clear language does not apply  
10 to these foreign liens, and that we therefore have no other  
11 objection with respect to the bid procedures. And so I suppose  
12 we would, to the extent our pleading was deemed to be an  
13 objection to bid procedures, we'd be withdrawing that, subject  
14 of course, to the possibility that this issue may rear its head  
15 at the sale hearing and we're reserving our rights with respect  
16 to that.

17 THE COURT: Okay.

18 MR. ABRAMOWITZ: I'm sorry, I wanted to clarify one  
19 thing. The point about that we are given an extended indemnity  
20 right, that will be in the order that's being approved today.

21 MR. BUTLER: The indemnities are in the agreement.

22 MR. ABRAMOWITZ: Right.

23 MR. BUTLER: I mean, the agreement doesn't get final  
24 approval. The only thing that's ever approved at a bid  
25 procedures order are the bid procedures.

1 MR. ABRAMOWITZ: Okay.

2 MR. BUTLER: The final approval of the indemnity will  
3 be in the sale agreement approved at the sale hearing.

4 MR. ABRAMOWITZ: Correct, but there will be a  
5 reference to the indemnity in the --

6 MR. BUTLER: Yes.

7 THE COURT: The debtors have amended the underlying  
8 purchase agreement to include that provision.

9 MR. BUTLER: Correct.

10 THE COURT: And that's a provision that they'll be  
11 showing to others as the stalking horse bid.

12 MR. BUTLER: Correct.

13 THE COURT: Okay. All right.

14 MR. ABRAMOWITZ: Thank you.

15 THE COURT: All right. In light of all of those  
16 clarifications on the record, I'll approve the bid procedures  
17 order and the related breakup fee. The procedures are  
18 reasonable in light of the efforts that the debtors have  
19 already undertaken to market these assets, the notice that they  
20 contemplate to various parties is appropriate, and the breakup  
21 fee itself, in light of the size of the transaction, is  
22 reasonable.

23 MR. BUTLER: Thank you, Your Honor. Your Honor, the  
24 last matter on the agenda for today, matter number 7, is the  
25 debtors' expedited motion to expand or suspend the equity

1 committee, at docket number 16558. This was filed with the  
2 consent of the creditors' committee under the supplemental case  
3 management order. And the only objection that's been filed has  
4 been filed by the equity committee at docket number 16565, who  
5 also filed a declaration of its chairman, which has also been  
6 filed publicly at docket number 16566. The creditors'  
7 committee has filed a statement in support of the debtors'  
8 motions at docket number 16568, and we filed our reply  
9 yesterday.

10 Your Honor, essentially, because of the circumstances  
11 of these Chapter 11 cases, we're asking Your Honor today to  
12 enter an order, either disbanding or suspending the equity  
13 committee, or directing the U.S. Trustee to do so. The reason  
14 that we have brought this matter to the Court is that the  
15 administrative process that was embarked on informally by the  
16 debtors last fall and formally by the creditors' committee this  
17 spring and then joined in by the debtors, did not result in a  
18 satisfactory result that would have addressed the issues and  
19 concerns of the debtors involving the use of estate resources.  
20 We did not describe that process in great detail. The equity  
21 committee elected, in its filings, to disclose all of the  
22 letters that support that administrative process in Exhibits A  
23 to I of Mr. Yacoub's (ph.) declaration. And so I would refer  
24 to those -- and they're now part of the record -- as to that  
25 administrative process.

1 I would, Your Honor, point back to Your Honor's order  
2 in docket number 30244 which originally approved the  
3 appointment of an equity committee here. In paragraph 7 of  
4 that order, Your Honor indicated that the Court would entertain  
5 a motion to disband the equity committee if subsequent  
6 circumstances support the conclusion that the debtors appear to  
7 be hopelessly insolvent. And then it goes on to discuss other  
8 conditions which are inapplicable here.

9 Your Honor, from the debtors' perspective, as we said  
10 in our papers, we believe that the members of the equity  
11 committee have performed their functions appropriately in these  
12 cases. We think they've acted in good faith. We believe they  
13 have been given appropriate counsel by their professionals.  
14 And the debtors do not have issues with any of that, and we've  
15 made that pretty clear in our record -- in our pleadings. We  
16 just believe that, based on the facts and circumstances of this  
17 case as they now exist, that the costs of an equity committee  
18 are no longer justified, and the existence of an equity  
19 committee when there is no reasonable possibility that there  
20 would be any distribution to them, that the work of that  
21 committee should now conclude.

22 So we filed that motion, Your Honor. I'm not going  
23 to speak beyond the papers that have said that, other than I  
24 did want to make the statements on the record about the  
25 debtors' views of the responsible nature in which the committee

1 has performed its functions to this date, but I ask that Your  
2 Honor grant the relief requested in the motion.

3 THE COURT: Okay.

4 MS. STEINGART: Good morning, Your Honor. Bonnie  
5 Steingart from Fried, Frank on behalf of the equity committee.  
6 It's been three years since the equity committee's appointment.  
7 And as you can see from the affidavit of our chairman that was  
8 filed, the members of the equity committee continue to be  
9 willing to serve. And the members of the equity committee  
10 believe that this is not an opportune time or the correct time  
11 to disband the committee. The debtor is on the brink of  
12 proposing yet another modification to its plan, and indeed,  
13 it's one that's eagerly awaited by all parties, and certainly  
14 the debtors' emergence is something that all of us hope occurs  
15 and hope occurs with the debtor as intact as possible.

16 But in connection with those additional filings,  
17 there will be numerous third party releases that are requests,  
18 some of which will be from equity holders. And to the extent  
19 that the equity committee had a role to begin with, and  
20 continues to have a role, it's with respect to addressing those  
21 releases and making whatever presentations can be made in  
22 support of the equity holders' continuing rights, if any, to  
23 pursue claims.

24 As Mr. Butler has indicated, the individuals who  
25 serve on the equity committee have served in good faith for a

1 number of years. In a sense, they're volunteers. It was the  
2 U.S. Trustee that solicited, among all the equity holders,  
3 individuals to volunteer to be part of this committee. And  
4 these individuals have volunteered and have served over this  
5 period of time, often at the expense of their own interests in  
6 being able to, at earlier points in time, trade out of these  
7 securities at higher prices. They certainly don't begrudge  
8 that, and as I said, are happy to continue to serve and believe  
9 that they do have a function. Thank you, Your Honor.

10 THE COURT: Well, let me ask you, I take it from your  
11 remarks, as well as from Mr. Sheller's (ph.) letter to the U.S.  
12 Trustee, that was in response to Mr. Rosenberg's letter on  
13 behalf of the creditors' committee that your focus and his  
14 focus was on a very limited issue, which is it appears that  
15 there's a view, which is certainly understandable, that the  
16 only realistic opportunity, even as an opportunity for a  
17 recovery by shareholders, is really in respect of claims  
18 against third parties that may, for one reason or another, get  
19 covered by release in a plan. Is that fair?

20 MS. STEINGART: That's correct.

21 THE COURT: All right.

22 MS. STEINGART: And also at earlier points in this  
23 case --

24 THE COURT: Oh, no, I'm leaving aside earlier points.  
25 It's clear to me there's been a substantial change in



1 circumstances --

2 MS. STEINGART: Right.

3 THE COURT: -- from what occurred earlier in the  
4 case. I did not take away from -- how do you pronounce it, Mr.  
5 Yacoub --

6 MS. STEINGART: Mr. Yacoub's.

7 THE COURT: -- Yacoub's letter or affidavit, that the  
8 members of the committee viewed the professional's role as  
9 limited in that way. And I can understand that view because  
10 those who serve on an official committee are fiduciaries for,  
11 in this case, the shareholders. And that means that they have  
12 fiduciary duties to look into all sorts of issues whenever the  
13 specter of fiduciary duty arises. Notwithstanding the  
14 qualified immunity that people have when they serve on a  
15 committee, their inclination is to look at other issues. So  
16 that, for example, if a plan came out, they would look not only  
17 at the release provisions, but ask you and perhaps Houlihan to  
18 say well, what is it -- you know, is this really the right  
19 projection as far as valuation is concerned, even though it  
20 appears that that would be a totally academic exercise.

21 MS. STEINGART: Right. At this point, the committee  
22 is really only seeking to have the services of its legal  
23 advisors and not the other advisors that were retained: one in  
24 connection with the investor litigation and the other being  
25 Houlihan. You know, there was also the issue --

1 THE COURT: But legal advisors can look at all sorts  
2 of things besides a release.

3 MS. STEINGART: Well, the difficulty was that many of  
4 the materials that the debtors do provide to the committee are  
5 materials that are for professional eyes only. So it's not a  
6 matter of following up on issues that are unrelated to the  
7 releases. What it is, is a matter of the committee members  
8 themselves not being able to read many of the materials that  
9 are directed to them as committee members. That really created  
10 the tension when there was the effort made to have just the  
11 committee members serve and not to have the expense --

12 THE COURT: Right.

13 MS. STEINGART: -- you know, of professionals. But  
14 then two days later arrived a package of materials where really  
15 only professionals could read them. And everyone's best hopes  
16 and plans were sort of shown to be not possible.

17 THE COURT: Right. Okay.

18 MS. STEINGART: Yes. Thank you, Your Honor.

19 THE COURT: Does anyone else have anything to say on  
20 this motion? Mr. Masumoto, should I take the U.S. Trustee's  
21 last word on this, the last letter in the exhibit package which  
22 is your response to Yacoub's letter?

23 MR. MASUMOTO: Yes, Your Honor. And I guess just for  
24 the record, part of our concern at the later stages of the  
25 negotiations was the concept of a committee that would exist

1 without any fiduciary obligations. And we --

2 THE COURT: Well, it would clearly have to have  
3 fiduciary obligations. The issue is whether they could  
4 exercise those without professionals in a case of this  
5 complexity. I mean, there are cases where committees are able  
6 to operate without professionals, but I understand Ms.  
7 Steingart's point that this is probably not that type of case.

8 MR. MASUMOTO: I understand, Your Honor. And from  
9 our standpoint, to the extent that there were any controls on  
10 the costs involved that would allow the committee to remain in  
11 place, certainly from our standpoint, we view that as an  
12 objectionable circumstance.

13 THE COURT: Okay.

14 MR. MASUMOTO: Thank you very much.

15 THE COURT: All right. Anyone else? I have before  
16 me a motion by the debtors for an order directing the U.S.  
17 Trustee to disband the official committee of equity security  
18 holders or alternatively to suspend its activities.

19 Actually, let me ask you, Mr. Masumoto, on the second  
20 point, on the suspension point, does the U.S. Trustee believe  
21 that could happen, whereby that the committee would not be an  
22 official committee as of this time, but if some issue arose,  
23 you wouldn't have to form a new committee, you could just go to  
24 these individuals?

25 MR. MASUMOTO: Once again, it may be a question of

1 nuance, again, but I did want to articulate again, as I stated  
2 before, the concern is the existence of a committee with no  
3 fiduciary obligations. If the suspension is treated, in fact,  
4 in lieu of a form of disbandment, then --

5 THE COURT: It would just save the administrative  
6 step of having to go out and solicit new people.

7 MR. MASUMOTO: Right. I understand, Your Honor, and  
8 in that case, again, if the idea of a suspension, in fact,  
9 indicates that any members who do operate and negotiate would  
10 not be doing so on behalf of the constituency. Again, that's  
11 our concern --

12 THE COURT: Okay.

13 MR. MASUMOTO: -- that a committee be in existence  
14 but not have a fiduciary obligation.

15 THE COURT: I understand. All right. So let me  
16 repeat. I have before me a motion by the debtors for an order  
17 directing the U.S Trustee to disband the official committee of  
18 equity security holders or alternatively to suspend their  
19 activities without any further date in mind. The motion is  
20 premised upon what appears to be at this point an undisputed  
21 fact, which is that looking to the debtors' own assets, there  
22 appears to be no reasonable prospect of a recovery in these  
23 cases by shareholders, pre-petition shareholders. And  
24 consequently, that the continued service of an official  
25 committee is no longer warranted, since the ultimate purpose of

1 a committee of that nature will be to obtain a merited or an  
2 earned or a proper recovery by its constituents, the  
3 shareholders. Rather, as I stated in my ruling appointing or  
4 authorizing the appointment of an official equity committee, in  
5 the circumstances where it appears clear that there would be no  
6 such recovery, the existence of an official committee would,  
7 since it's funded out of the debtors' estate, would in effect  
8 be a gift, and gifts are not permitted in this context.

9 The order appointing or authorizing the appointment  
10 of the official committee, as well as my bench ruling, clearly  
11 contemplated this possibility. The bench ruling noted that the  
12 request to form an equity committee came early in the cases,  
13 and that in the particular context of these cases, that timing  
14 was appropriate. That was in light of the fact that the  
15 debtors' Chapter 11 cases were not merely going to be cases  
16 where the capital structure would be adjusted, but rather were  
17 cases where the debtors, a) were attempting to engage in major  
18 transformations of their business, and b) were dealing in an  
19 environment where their business and industry itself was  
20 subject to major transformation. Given that uncertainty, and  
21 the possibility, at the time, that those two transformative  
22 possibilities could result in some recovery by shareholders, I  
23 believed it was important for the debtors, in their  
24 negotiations and analysis, to have the input of an official  
25 equity committee.

1 I noted several times, however, in the ruling, that  
2 depending upon how the transformational solutions actually  
3 occurred, and how the debtors' business and industry might be  
4 transformed, could well result in a second look at the  
5 continued existence of an equity committee. For example, at  
6 page 181 of the transcript I stated, "I also will look very  
7 carefully at whether the continued incurrence of fees is  
8 appropriate at various stages in the case when picture on  
9 valuation becomes clearer."

10 The order itself directing the appointment of the  
11 official committee stated in the factual findings section that,  
12 quote, "Under the present circumstances, and subject to the  
13 terms and conditions of this order, it is a proper exercise of  
14 the Court's discretion to direct such an appointment." And  
15 then, as Mr. Butler noted, in paragraph 7 of the order, the  
16 order provided that "The Court will entertain a motion to  
17 disband the equity committee if subsequent circumstances  
18 support the conclusion that the debtor appears to be hopelessly  
19 insolvent."

20 Unfortunately, although the debtor, I believe, has  
21 been able to fulfill the goals it set itself for transforming  
22 its business, the transformation in its industry has gone in a  
23 different direction. And I believe -- and I believe this is  
24 uncontroverted on this record, that at this time it appears  
25 clear that the debtor will, under any scenario, not be able to

1 make a distribution to its pre-petition shareholders from its  
2 own assets. That's reflected, among other things, by the  
3 trading prices on the debt that are highlighted in footnote 6  
4 of the motion, as well as the pleadings and representations in  
5 court by the equity committee today.

6 Under those circumstances, it appears to me to be  
7 appropriate not to subject the members of the equity committee  
8 to continued service acting as a fiduciary for shareholders who  
9 appear to have no hope of a recovery from these debtors. It's  
10 equally appropriate not to saddle the debtors' estate with the  
11 cost of maintaining such a committee. I agree with the U.S.  
12 Trustee that in this context, in a case of this complexity, it  
13 would not be appropriate to permit the committee to serve  
14 without at least counsel. And I believe that obviously there's  
15 no prospect of counsel doing this on a pro bono basis, nor  
16 should there be. So there would obviously be a direct cost to  
17 the estate of continuing the committee in existence.

18 In addition, there's an indirect but very meaningful  
19 cost of continuing to have the committee in existence, which is  
20 the necessity of the other parties-in-interest, obviously  
21 including the debtor, but also the other key parties-in-  
22 interest, to incur costs in dealing with the equity committee  
23 and its professionals.

24 It has been suggested that there is still a potential  
25 recovery, or potential for recovery by shareholders in this

1 case, not from the debtors' assets, but from potentially a  
2 price that might be paid by third parties who would be  
3 receiving a release in the case, in respect of rights and  
4 claims against them that are not the debtors or a derivative of  
5 the debtors' rights, but would be uniquely individual  
6 shareholders' rights. I believe that first, that prospect is  
7 one that is, at least based on the current record, speculative.  
8 Secondly, I don't believe it is a prospect that the estate  
9 should be paying for. It is a fairly discrete legal issue that  
10 many courts have dealt with, including most recently the Second  
11 Circuit in the Johns-Manville litigation, which is currently  
12 sub judice at the Supreme Court. I don't believe it is an  
13 issue that requires a continuing functioning committee to  
14 address. Rather, if and when such release is sought, I believe  
15 that there are sufficient incentives for those who may have  
16 unique claims against potentially released parties to raise  
17 their issues at that time.

18 I considered, as reflected by my question of Mr.  
19 Masumoto, whether instead of disbanding the committee, I should  
20 issue an order suspending the committee. But I believe that  
21 while perhaps the order could make it clear that the committee  
22 would, during its time of suspension have no fiduciary duties,  
23 and that the suspension would only be a procedural mechanism to  
24 avoid the delay involved in creating a new committee, should  
25 the need ever arise, it appears to me that the suspension of a



1 committee would raise more issues than it would potentially  
2 solve. And it would not be clear to me, if I were a member of  
3 such a suspended committee, what my duties and obligations  
4 were, for example, in respect of trading and the like.

5 And consequently, it seems to me that the proper  
6 course here is to disband the committee in light of the  
7 occurrence of the condition that I quoted from in my order  
8 originally appointing the committee. And that if in fact there  
9 ever is a time when it makes sense to reappoint a committee,  
10 these individuals may still be willing to serve, but  
11 recognizing that there was a true gap in between when they were  
12 not fiduciaries, except of course, in respect of any sort of  
13 ongoing obligation or in respect of confidentiality and the  
14 like from what they learned when they were serving.

15 So again, I will grant the debtors' motion and issue  
16 an order directing the U.S. Trustee to disband the committee.  
17 I believe I clearly have the power to do so under the Texaco  
18 case from this district as well as the conditions in my own  
19 order which contemplated this possibility.

20 In doing so, I want to state, as Mr. Butler stated,  
21 that I see no evidence at all of any sort that the committee  
22 acted in any way improperly. There were other potential  
23 conditions in my order that stated that if the committee or its  
24 professionals did act improperly I would also issue an order  
25 disbanding the committee. That's clearly not the case here.

1 The only reason for disbanding the committee is the debtors'  
2 present and foreseeable financial condition and the absence of  
3 any prospect of a recovery by the shareholders. But again,  
4 from all that I have seen, the committee has acted responsibly  
5 in this case in the representation of its constituency, as have  
6 the committee's professionals.

7 So in addition to submitting the orders on the bid  
8 procedures and the supplemental second amendment, the discs on  
9 those orders, Mr. Butler, you should submit the order directing  
10 the U.S. Trustee to disband the committee.

11 MR. BUTLER: We will, Your Honor.

12 THE COURT: Okay.

13 MR. BUTLER: Your Honor, that completes the agenda  
14 for this morning. Thank you very much.

15 THE COURT: Okay. Thank you.

16 IN UNISON: Thank you, Your Honor.

17 (Proceedings concluded at 11:21 a.m.)  
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I N D E X

RULINGS

	Page	Line
Supplemental second amendment motion approved	11	22
Bid procedures order and related breakup fee approved	20	15
Motion approved to direct U.S. Trustee to disband the equity committee	33	15

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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SHARONA SHAPIRO

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Date: April 24, 2009